TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1922

No. [redacted]208

BALTIMORE & OHIO RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 17, 1921.

(28,575)

(28,575)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 620.

BALTIMORE & OHIO RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1921.

1

1. PETITION AND EXHIBIT No. 1.

Filed May 4, 1921.

In the Court of Claims of the United States.

No. 104-A.

BALTIMORE & OHIO RAILROAD COMPANY

vs.

THE UNITED STATES.

Petition.

To the Honorable the Chief Justice and Judges of the Court of Claims:

Your petitioner respectfully shows unto your honors the following facts:

1. Petitioner is a corporation organized under the laws of the State of Maryland and operates, and at the time hereinafter stated did operate, a system of railroads in Interstate Commerce in the United States. That prior to November 12, 1918, and on or about
2 the fifteenth day of December, 1917, your petitioner entered into an informal or implied agreement with an officer or agent acting under the authority, direction or instruction of the Secretary of War of the United States on behalf of the United States for the payment by the United States to your petitioner for extraordinary expenses incurred by your petitioner in connection with the construction of the Marley Neck Branch Railroad of your petitioner situated in the State of Maryland, and for the payment of the construction of a special detour track, trestle and turnout in connection with the construction of said Marley Neck Branch Railroad to the site of the United States Ordnance Depot, Curtis Bay, Maryland, for transportation purposes. There is due and owing your petitioner by the United States for the aforesaid construction covering cost of facilities including labor, material and equipment rental the sum of eighty-five thousand, four hundred, seventy-four dollars and six cents ($85,474.06).

2. The nature, terms and conditions of the informal or implied agreement in the matter of the claim of your petitioner are as follows:

Previous to the summer of 1917, surveys had been made and adopted by your petitioner for a railroad known as the Marley Neck Branch Railroad to extend along the west side of Curtis Creek in the State of Maryland from a point on your petitioner's Curtis Bay Branch Railroad in said State of Maryland, near the Standard Guano

Company's plant in the city of Baltimore, Maryland, to Thomas Point, Maryland; thence crossing Curtis Creek in the State of Maryland at the aforesaid Thomas Point, Maryland, on a bridge and from said bridge thence in a southwesterly direction to the
3 Magothy River in the State of Maryland. The said Marley Neck Branch Railroad as described aforesaid was projected for the purpose of developing the territory in the valley of Curtis Creek, Maryland, and along the west shore of the Patapsco River in the State of Maryland.

During the late summer of 1917 the War Department of the United States decided to construct and did construct an Ordnance Depot between Curtis Creek and Back Creek in the State of Maryland. The line location of the Marley Neck Branch Railroad as heretofore set forth passed directly through the location of the said Ordnance Depot and the United States on this account insisted that the line of the said Marley Neck Branch Railroad be changed in order that it would pass along one of the sides of the proposed Ordnance Depot location and not directly through the center of said location. In order, therefore to comply with the request of the United States your petitioner decided to locate the crossing of its said Marley Neck Branch Railroad over the said Curtis Creek, as heretofore referred to, at Stahl's Point, Maryland, instead of Thomas Point, Maryland. This change of plans involved extensive surveys, and a very radical relocation of the line of the said Marley Neck Branch Railroad on both sides of Curtis Creek, Maryland. The said surveys were not completed until some time in November, 1917. On September 25, 1917, your petitioner contracted with the McLean Contracting Company, of Baltimore, Maryland, on a unit-price basis, for the construction of the portion of the new line of railroad of the said Marley Neck Branch Railroad from a point on your petitioner's Curtis Bay Branch Railroad near the Standard Guano Company's plant in the City of Baltimore, Maryland, to a point adjacent to the site
4 of the said proposed United States Ordnance Depot between Curtis Creek and Back Creek in the State of Maryland. The surveys, heretofore set forth with respect to the relocation of the said line of the Marley Neck Branch Railroad were still being made at the time of the letting of the contract by your petitioner to the McLean Contracting Company and that the final location of the Marley Neck Branch Railroad in the vicinity of Curtis Creek Crossing, Maryland, was not definitely determined until a later date, the contractor, the McLean Contracting Company, was unable to begin its operations on the said Marley Neck Branch Railroad south of Cabin Branch, Maryland, for the aforesaid reasons until November 16, 1917. The McLean Contracting Company, by the terms of the said contract with your petitioner, were required to complete said contract on or before December 25, 1917, but by reason of the delay heretofore explained for which they were not responsible, your petitioner would have extended the time of the said McLean Contracting Company for completing the said contract to at least February 25, 1918, and the said construction having to be done in the winter months, through no fault of the said contractor, the McLean Contracting Company, your petitioner would no doubt have had to extend the time to even

a much later date than February 25, 1918. Early in December of 1917 it had become apparent to the officers of the United States War Department that the construction of the said Marley Neck Branch Railroad would be delayed to such an extent that the War Department's operations at the United States Ordnance Depot, Curtis Bay, Maryland, would be seriously delayed. On December 15, 1917, and subsequently thereto, the officers of the United States War
5 Department at Washington, D. C., and those at the said Curtis Bay Ordnance Depot insisted that the said Marley Neck Branch Railroad be completed at the earliest possible date. This is strongly emphasized, for under date of December 15, 1917, F. M. Gunby, Major, Quartermaster R. C. of the United States Army, then stationed at Washington, D. C., wrote a letter to your petitioner for the attention of its General Superintendent, M. H. Cahill, at Baltimore, Maryland, as follows:

"War Department,

Office of the Quartermaster General of the Army,

Washington, D. C.

December 15, 1917.

No. 617 CR-E (Curtis Bay).

From: Officer in Charge of Cantonment Construction.

To: Mr. M. H. Cahill, General Superintendent, B. & O. R. R. Co., Baltimore, Md.

Subject: Curtis Bay Track Facilities.

"1. Confirming conversation with your chief clerk today, will state that we are exceedingly anxious for you to get your branch line now under construction, extended to our Curtis Bay Ordnance Depot. Since the original plans were made, we have added to this layout two (2) very large warehouses which will mean a great increase in the amount of freight to be handled through this terminal. It is very urgent that we have track facilities both for handling construction material and freight at the earliest possible moment. It seems to us from observation on the ground that our operations are going to be very seriously hampered by lack of track facilities unless your company is able to greatly increase progress being made on construction at this branch.

6 2. If you desire, I should be pleased to meet you on the ground and go over this matter at an early date.

3. Please address your reply to the personal attention of Mr. R. M. White.

By authority of the Secretary of War.

I. W. LITTELL,
Brigadier General, Q. M. Corps, N. A.,
In Charge of Cantonment Construction.
By F. M. GUNBY,
Major, Quartermaster, R. C."

F. M. G. R. M. W. E. D.

It will be very clearly noted that the aforesaid letter of Major F. M. Gunby particularly emphasizes the construction of the said Marley Neck Branch Railroad for the urgent needs of the United States for the handling of construction material and freight to the United States Ordnance Depot at Curtis Bay, Maryland. This urgent communication of Major Gunby was referred by the said M. H. Cahill on December 20, 1917, to H. A. Lane, Chief Engineer of the Baltimore and Ohio Railroad Company, and was by Mr. Lane referred for action on December 28, 1917, to Mr. J. T. Wilson, District Engineer of the Baltimore and Ohio Railroad Company at Baltimore, Maryland.

In order, therefore, to meet the urgent needs of the United States, as hereinbefore set forth, it became necessary for your petitioner to cancel its said contract with the McLean Contracting Company for the construction of the said Marley Neck Branch Railroad, as heretofore set forth, on the basis of unit price and contract with
7 another contractor upon a cost plus basis in order to expedite the construction of the said Marley Neck Branch Railroad for the urgent needs of the United States.

Your petitioner on January 5, 1918, therefore determined to cancel the unit price contract it had with the McLean Contracting Company for the construction of the said Marley Neck Branch Railroad and did cancel said contract. On January 5, 1918, a contract was entered into between your petitioner and the Empire Engineering Company to complete the work of construction of the said Marley Neck Branch Railroad on a cost plus basis and said Empire Engineering Company commenced work on said construction on January 6, 1918, and continuously pursued the work both day and night from the said January 6, 1918, until the completion of the said construction in the latter part of February, 1918. Your petitioner in order to abrogate its said contract for the construction of the said Marley Neck Branch Railroad with the McLean Contracting Company was required to pay the said McLean Contracting Company for all the construction work that had been done by the said McLean Contracting Company to January 6, 1918, on a cost plus basis and no payment was made to the said McLean Contracting Company on the unit price as set out in the original contract between your petitioner and the said McLean Contracting Company heretofore referred to.

In addition to the letter of Major Gunby, heretofore set forth, Major Ralph F. Proctor, of the United States Army, Constructing Quartermaster at Camp Meade, Maryland, and the United States Ordnance Depot at Curtis Bay, Maryland, stated to George S. Harlan, Chief Clerk to A. W. Thompson, Vice-President of the Balti-
8 more and Ohio Railroad Company, on or about November 6, 1917, that the War Department desired to have the Marley Neck Branch Railroad constructed to the United States Ordnance Depot at Curtis Bay and in addition to the said request there were a number of conferences between the said Major Ralph F. Proctor and the said George S. Harlan relating to ways and means to have the said Marley Neck Branch Railroad constructed as quickly as

possible and the said George S. Harlan did urge the engineering department of your petitioner to speed up the work of construction in every possible way so as to render every assistance to the United States during the emergency that then existed. That Major Fred A. Wood, of the United States Army, Constructing Quartermaster at the United States Ordnance Depot at Curtis Bay, Maryland, conferred a number of times with Mr. J. T. Wilson, Consulting Engineer of your petitioner, in order to expedite the construction of the said Marley Neck Branch Railroad. That Smith, Hauser and McIsaac, contractors for the United States at the United States Ordnance Depot, Curtis Bay, Maryland, acting through F. J. McIsaac of said firm conferred and cooperated with officers of the United States War Department in assisting to find ways and means to expedite the construction of the said Marley Neck Branch Railroad in order to obtain material for the construction of the said United States Ordnance Depot at Curtis Bay, Maryland, as it was difficult to have the material brought to the said United States Ordnance Depot unless it was transported over the said Marley Neck Branch Railroad.

3. Your petitioner contends that it should be compensated by the United States for the excess cost of the construction of the entire Marley Neck Branch Railroad, in excess of the cost of the said road at the original unit price as agreed to by your petitioner with the
9 McLean Contracting Company and that the extraordinary expenses incurred in the construction of hurrying the completion of said Marley Neck Branch Railroad were such from which your petitioner derived no benefit and will not derive any benefit. The extraordinary expenses were made on urgent demand of the United States War Department and were solely for the benefit of said War Department. Your petitioner annexes hereto (Exhibit No. 1). Detailed statement showing the articles or work delivered to and accepted by the United States, and the exact nature and extent of all expenditures, obligations or liabilities necessarily incurred, including all work, labor and services necessarily rendered by your petitioner. The total amount of said claim is eighty-five thousand, four hundred, seventy-four dollars and six cents ($85,474.06).

4. Petitioner presented its said claim in the amount of $9,058.55, on June 27, 1919, to the War Department under the provisions of the act of March 2, 1919, 40th Stat. L., 1272. The said claim was amended on April 2, 1920, and the amount increased to $85,474.06. On June 4, 1920, the Claims Board, Transportation Service, War Department, denied relief to your petitioner. Appeal was taken from the said decision of the Claims Board, Transportation Service, to the Appeal Section, War Department, and a hearing was had before said Appeal Section on July 16, 1920. Under date of August 12, 1920, said Appeal Section denied relief to your petitioner, but in its decision said:

"While the construction in question inured to the benefit of the War Department by enabling it to get certain of its materials into the Ordnance Supply Depot at Curtis Bay, yet that was not the sole object of the construction of this track."

10 Under date of August 20, 1920, your petitioner appealed from the decision of the said Appeal Section to the Secretary of War and under date of November 24, 1920, that official denied relief to your petitioner.

5. That no action upon your petitioner's foregoing claim has been had before Congress. That said claim was presented to the Secretary of War, and that the total amount of said claim, $85,474.06, was disallowed by the Secretary of War, and your petitioner protested the disallowance of the said amount to the Secretary of War under date of August 20, 1920, but to no avail, and said Secretary of War adheres to his said action of rejection. That no transfer or assignment of said claim or any part thereof or interest therein has been made. That said claim is now owned by your claimant, and no other person or corporation is the owner thereof or is interested therein, and that your petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credit and set-offs; that your claimant has at all times borne true allegiance to the United States, and has not in any way voluntarily abetted or given encouragement to rebellion against said Government.

Prayers.

Wherefore your claimant prays:

1. That the court will render a judgment against the United States in favor of your claimant for payment by the United States to your claimant of the said sum of eighty-five thousand, four hundred seventy-four dollars and six cents ($85,474.06).

11 2. That your claimant may have such other and further relief as the nature of the case may require and to the court may seem meet and proper.

BALTIMORE AND OHIO RAILROAD COMPANY,
By W. D. OWENS, *Assistant Comptroller.*

JOHN F. McCARRON,
Attorney of Record.
GEORGE E. HAMILTON,
Of Counsel.

STATE OF MARYLAND,
City of Baltimore, To wit:

W. D. Owens, being duly sworn, says he is Assistant Comptroller for the Baltimore & Ohio Railroad Company; that he has authority to subscribe to and verify the foregoing petition from said company, that he has read said petition, knows the contents thereof and the facts therein stated, and that he believes the same to be true.

GEO. W. HAULENBEEK,
Notary Public, State of Maryland.

My commission expires May 1, 1922.

STATE OF MARYLAND,
City of Baltimore, To wit:

C. W. Woolford, being first duly sworn, he says he is Secretary of the Baltimore & Ohio Railroad Company; that W. D. Owens who has subscribed to and verified the petition of said company hereto, is authorized to do so.

C. W. WOOLFORD.

12 Subscribed and sworn to before me this 27 day of April A. D. 1921.

GEO. W. HAULENBEEK,
Notary Public, State of Maryland.

My commission expires May 1, 1922.

EXHIBIT No. 1.

United States Government—War Department—to The Baltimore & Ohio Railroad Company, Dr.

For Excess cost of construction of Main Line, Marley Neck Branch and Detour Track west of Cabin Branch incident to construction of Ordnance Depot for U. S. Government at Curtis Bay, Md., together with cost of connection to Ordnance Depot as per details attached:

(1) Excess Cost of Main Line	$74,851.33
(2) Detour Track	9,582.86
(3) Connection to Ordnance Depot	939.87
Total	$85,474.06

Statement of Excess Costs.

Item.	Quantity.	Contract unit price.	Total cost contract unit prices.	Actual unit prices.	Actual cost.	Unit price excess.	Excess cost.
Grading	46,848 C. Y.	$0.64	$29,982.72	$1.93	$90,661.34	$1.29	$60,678.62
Grading, Cinder Fill (Trestle)	4,368 C. Y.	0.40	1,747.20	0.40	1,747.20	.....	.....
Grading, Cinder Fill (Road-bed)	2,682 C. Y.	.....	.....	2.40	6,388.80	2.40	.....
Bridges, Trestles, and Culverts:							
Permanent Trestle:							
Piling	5,052 Ft.	0.85	4,294.20	0.94	4,755.61	0.09	461.43
Timber in Place	71,082 M. B. M.	100.00	7,108.29	128.37	9,124.33	28.37	2,016.13
Concrete Pipe, 18"	288 Ft.	4.00	1,072.00	6.97	2,008.00	3.97	936.00
Concrete Pipe, 24"	254 Ft.	6.50	1,651.00	9.00	2,286.00	2.50	635.00
Ties:							
No. 1 Treated	417 Ea.	1.05	437.85	1.05	437.85	.....	.....
No. 2 Treated	3,000 Ea.	0.95	2,944.05	0.95	2,944.05	.....	.....
Switch Timber	3,500 B. M.	30.00	105.00	30.00	105.00	.....	.....
Rail:							
90-lb. Repair	196.85 Ton.	35.00	7,062.40	35.00	7,062.40	.....	.....
Other Track Material:							
Angle Bars, 90-lb. Repair	888 Ea.	0.35	312.53	0.35	312.53	.....	.....
Bolts, 1" x 4¾"	1,925 Ea.	0.066	126.99	0.066	126.99	.....	.....
Spikes	58 Kegs.	5.535	321.10	5.535	321.10	.....	.....
Frogs	1 Ea.	32.50	32.50	32.50	32.50	.....	.....
Switch	1 Ea.	32.50	32.50	32.50	32.50	.....	.....
Switch Stand	1 Ea.	9.65	9.65	9.65	9.65	.....	.....
Guard Rails	2 Ea.	8.80	17.60	8.80	17.60	.....	.....

Ballast:							
Cinders	2,756 C. Y.	*0.40	1,102.40	0.40	1,102.40	.....	.....
Track Laying and Surfacing	7,425 Ft.	†1.35	10,023.75	1.85	13,750.10	0.50	3,735.35
Crossings and Signs:							
Overhead Bridge:							
Foundation Excavation	895 C. Y.	6.03	5,400.35	6.03	5,400.35	.....	.....
Foundation Concrete	89 C. Y.	25.50	2,289.05	25.50	2,289.05	.....	.....
Neat, Concrete	104 C. Y.	25.72	2,674.88	25.72	2,674.88	.....	.....
Steel	33,400 lbs.	.04745	1,585.72	.04745	1,585.72	.....	.....
Labor, Erecting Steel	35,000 lbs.	.034	1,183.10	.034	1,183.10	.....	.....
Labor, Grading Approaches	675 C. Y.	1.11	748.27	1.11	748.27	.....	.....
Flooring	11,091 M. B. M.	70.34	780.12	7.34	780.12	.....	.....
Land	.....	.....	50.00	.....	50.00	.....	.....
Grade Crossing:							
Lumber	415 l. f.	.029	11.46	.029	11.46	.....	.....
Labor Installing	.....	.....	30.00	.....	30.00	.....	.....
Engineering	.....	.....	83,136.59	.....	157,987.92	.....	74,851.33
			8,993.99	.....	8,993.99	.....	.....
			92,130.58	.....	166,981.91	.....	74,851.33

*Actual costs on this work.
†Actual costs for track laying and surfacing on jobs done at same time in vicinity of Baltimore.

14 Marley Neck Branch.

Cost of Labor Constructing and Removing Temporary Track We of Cabin Branch to Reach Curtis Bay Ordnance Depot in Advan of Completion of Main Line Construction.

Grading—2,000 c. y. @ $2.02	$4,034.0
Ballast—400 c. y. @ 0.40	160.0
Track Laying and Surfacing, 1,775 l. f. @ 1.83	3,248.2
Removing Track, 1,775 l. f. @ 0.91	1,624.1
	$9,066.4
Engineering	516.4
Grand Total	$9,582.8

From Point of Switch to Clearance.

Rail, 90# Repair	1.36	Tons	@	$865.00	$100.40
Switch Timber, 1 Set	3,500	B. M.	@	45.00	157.50
Angle Bars, 90# Repair	16		@	.96	15.36
Bolts, 1" x 4¾"	48		@	.10	4.80
Spikes	2	Kegs	@	10.875	21.75
Frogs, #8 15' 90# Repair	1		@	96.64	96.64
Switch, Complete 90# 16½'	1		@	76.69	76.69
Switch Stand	1		@	15.75	15.75
Guard Rails	2		@	15.04	30.08
Total Material					$518.97
Labor, Laying and Surfacing Turnout					$366.00
Labor, Supervision 15%					54.90
Total Labor					$420.90
Total					$939.87

Summary.

Total Material	$518.97
Total Labor	420.90
Total	$939.87

Marley Neck Branch.

Rail:						
Rail, 90# Repair	196.85	Tons	@	$35.00	$7,062.40	$7,062.40
Ties:						
Switch Timber	3,500	B. M.	@	30.00	105.00	.....
Ties, No. 1 Treated	417		@	1.05	437.85	.....
Ties, No. 2 Treated	3,099		@	.95	2,944.05	.....
						3,486.90
Other Track Material:						
Angle Bars, 90# Repair	888		@	.35	312.53	.....
Bolts, 1″ x 4¾″	1,925		@	.066	126.99	.....
Spikes	58	Kegs	@	5.535	321.10	.....
Frogs	1		@	32.50	32.50	.....
Switches, Complete	1		@	32.50	32.50	.....
Switch Stand	1		@	9.65	9.65	.....
Guard Rails	2		@	8.80	17.60	.....
						852.87
						$11,402.17

Summary.

Rail	$7,062.40
Ties	3,486.90
Other Track Material	852.87
	$11,402.17

(Here follows page Exhibit No. [illegible])

United States of America
Curtis Bay Ordnance Depot
100
"L H"
STAHL P
110
N65°35'E
120
120
130
4
20
ANNE ARUNDEL CO
BALTIMORE CI
140
United States of America
Coast Guard Depot
150
S67°28'E
Katherine R. Wa
160
170
2°20'
Arundel Cove
"L"
John W. Frick
To Hawkins Point
1. H.L. Tall
2. S.O. Heiskell
3. M.A. Stegman
4. E. Douglas
5. E.J. Janson
6. E. Douglas
7. E. Douglas
8. E. Douglas
9. B. Ott
10. August Wienhold
11. William Lange

17 Charles S. Walton & Co. Inc. - Tanners.
13 14 Chesapeake Ship Building Co.
15 Henry Smith & Son
16 August Smith.
17 George Stoll
EXHI
BALTIMOR
BALTIMORE D
MARLEY
GROUND LOCAT
STATION 12 T
ANNE ARUN
Scale, 1in.= 1000
Office of
Balti
J. Franklin Abell
CURTIS
HL. POINT
WALNUT POINT
CREEK
CABIN BRANCH
Frances B. Dalton
COUNTY
CITY
Hawkins Point Road
Sarah A. Coursey
Davison Chemical Co.
Swift & Co.
Watson
Davison Chemical Co.
SLEDDS POINT
CURTIS BAY
Associated Chemical Co.
Standard Guano
U.S Industrial Alcohol Co.
Baltimore Car & Foundry Co.
To Baltimor
6½° 1916
Private Rd.
Marsh Stream
18" Conc. Pipe 1x1 Wood Box.
2-24" Conc. Pipe
18" Conc Pipe
18" Conc. Pipe
County Rd. 24" Conc. Pipe 24" Conc. Pipe
County Rd.
Cabin Creek
18" Conc. Pipe
24" Conc. Pipe
Pennington Ave.
24" Conc. Pipe
18" Conc. Pipe

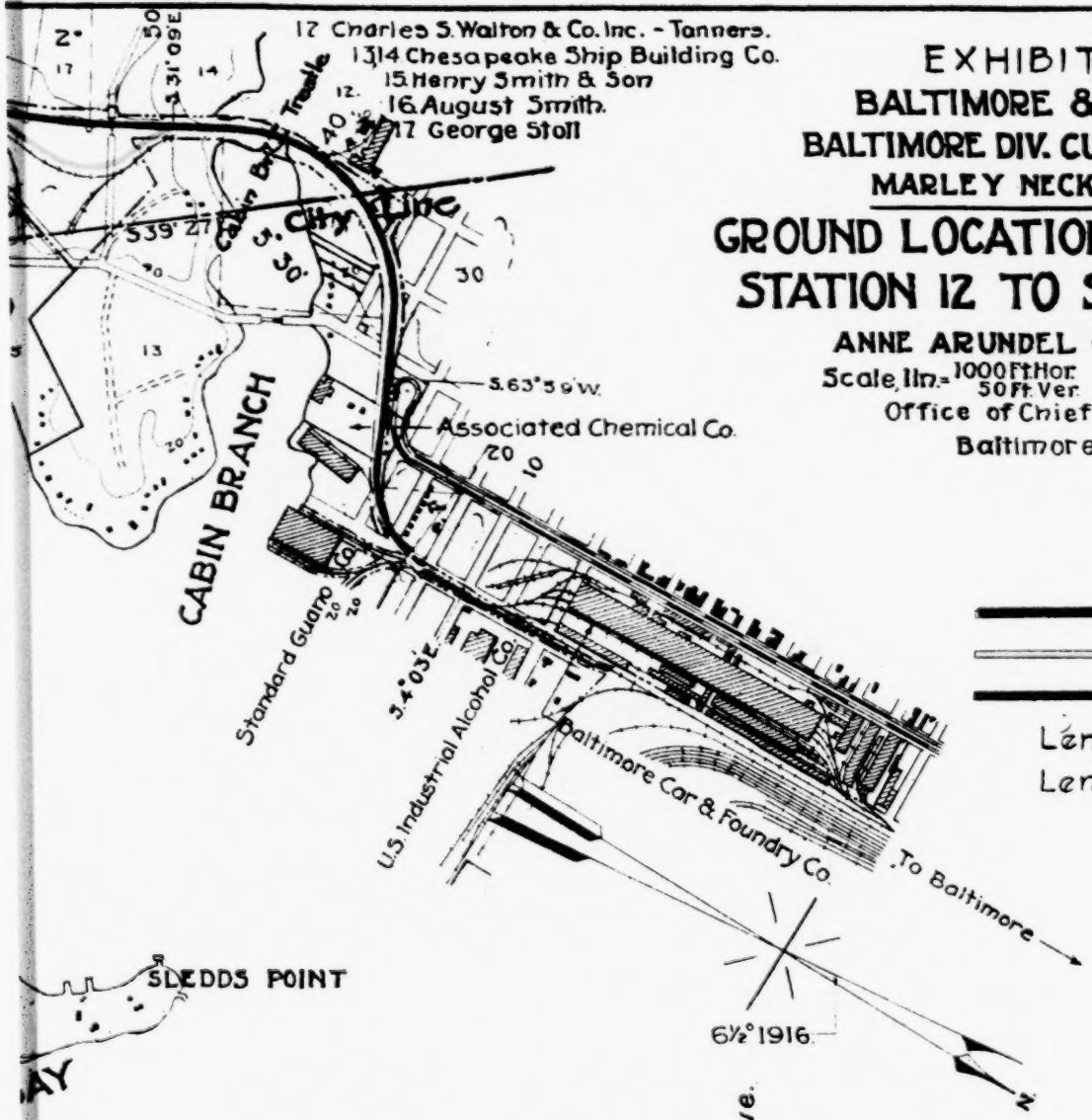


EXHIBIT # 2

BALTIMORE & OHIO R.R.

BALTIMORE DIV. CURTIS BAY MD.

MARLEY NECK BRANCH

GROUND LOCATION LA-LH-LI-LJ.

STATION 12 TO STATION 464

ANNE ARUNDEL CO. MD.

Scale, 1 In. = 1000 Ft. Hor. / 50 Ft. Ver. Jan, 1919

Office of Chief Engineer

Baltimore, Md.

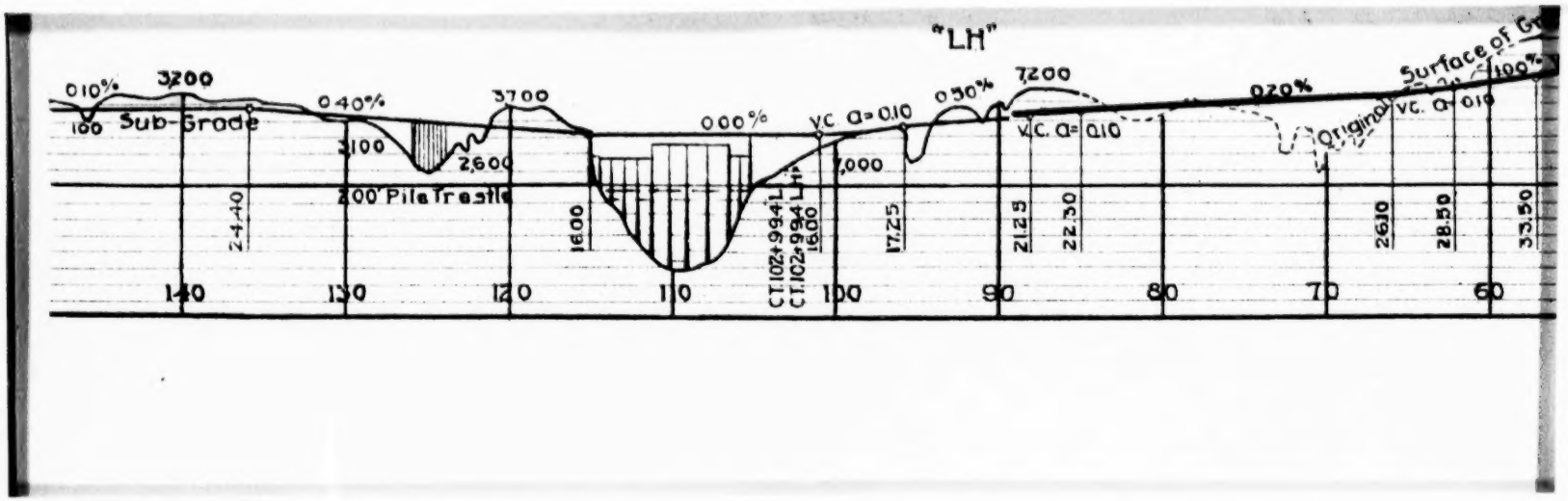
Main Line — 7672.7

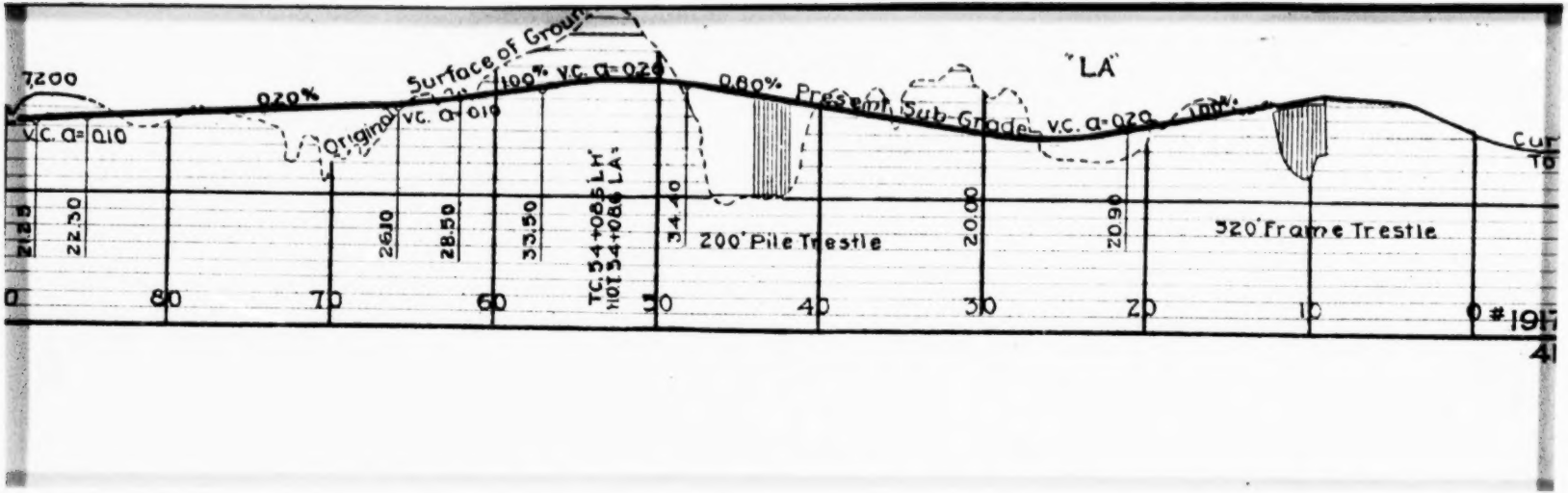
Detour Track

Connecting Track - 200'

Length - 2403.7' in City

Length - 5269.0' in County.


"LH"
010%
3200
100
Sub-Grade
040%
3100
2600
200' Pile Trestle
3700
000%
VC. a=0.10
050%
7200
7000
020%
Surface of Gr
100%
Original
VC. a=0.10
VC. a=0.10
2440
1600
1600
1725
2125
2230
2610
2850
3350
140
130
120
110
100
90
80
70
60


7200
0.20%
Surface of Groun
1.00% V.C. a=0.20
0.80% Present Sub-Grade V.C. a=0.20
"LA"
V.C. a=0.10
Original V.C. a=0.10
21.25
22.30
26.10
28.50
33.50
34.40
20.00
20.90
200' Pile Trestle
320' Frame Trestle
TC. 54+085 LH'
HOT 54+086 LA'
0
80
70
60
50
40
30
20
10
0 #191
41

18 II. *Demurrer.*

Filed June 29, 1921.

The United States, by the Attorney General, demurs to the petition filed herein upon the ground:

(1) That the petition does not state facts sufficient to bring the plaintiff within the class of persons referred to in Section 1 of the Act of March 2, 1919, (40 Stat. c. 94), known as the Dent Act, and to constitute a case specified in that section.

(2) That the Court is without jurisdiction to find and award the plaintiff any compensation whatsoever*soever* under Section 2 of said Act.

(3) That the petition does not state facts sufficient to constitute a cause of action under the general jurisdiction of the Court.

ROBERT H. LOVETT,
Assistant Attorney General.

J. ROBERT ANDERSON,
Special Assistant to the Attorney General.

19 III. *Argument and Submission of Demurrer.*

On October 11, 1921, the demurrer was argued and submitted by Mr. J. Robt. Anderson, for the defendant, and Mr. John F. McCarron, for plaintiff.

IV. *Opinion of the Court by Hay, J.*

Filed October 24, 1921.

HAY, *Judge*, delivered the opinion of the court:

This is a petition brought by the Baltimore & Ohio Railroad Company to recover from the United States the sum of $85,474.06. To this petition of the plaintiff the defendants have demurred.

The plaintiff alleges in its petition that prior to November 12, 1918, and on or about December 15, 1917, it entered into an informal or implied agreement with an officer acting under the authority, direction, or instruction of the Secretary of War on behalf of the United States for the payment by the United States to the petitioner for extraordinary expenses incurred by the petitioner in connection with the construction of the Marley Neck Branch Railroad of the petitioner situated in the State of Maryland, and for the payment of the construction of a special detour track, trestle, and turnout in connection with said construction to the site of the United States Ordnance Depot, Curtis Bay, for transportation purposes, and that there is due and owing to the petitioner for the aforesaid construction the sum of $85,474.06.

Not relying on the aforesaid allegation, the petitioner proceeds to set out in its petition the facts from which it deduces that an informal or implied agreement was entered into by the United States for the payment of the sum of money which it demands.

It is not necessary to set out in this opinion these facts which are recited in full in the petition. Suffice it to say that after a careful examination of the facts relied upon by the petitioner, the court is of opinion that no agreement can be inferred from them which obligates the United States to pay the money claimed to be due. The facts alleged in the petition do not disclose any agreement, express or implied, between the petitioner and the United States, and therefore this court can not give relief either under the Dent or Tucker Acts. In order to recover in this court under either act there must be a promise to pay, or the implication of a promise to pay. The demurrer of the defendant is therefore sustained, and the petition of the plaintiff is dismissed.

Graham, Judge; Downey, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

20 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Twenty-fourth day of October, A. D., 1921, judgment was ordered to be entered as follows:

This case was submitted upon the defendant's demurrer to the plaintiff's petition, on consideration whereof the court is of the opinion that the demurrer is well taken,

It is therefore Ordered, adjudged and decreed that the defendant's said demurrer to the plaintiff's petition be sustained, and that the petition be and the same is hereby dismissed.

By THE COURT.

VI. *Plaintiff's Application for and Allowance of an Appeal.*

Now comes the Baltimore and Ohio Railroad Company by its attorneys, George E. Hamilton, of counsel, and John F. McCarron, attorney of record, and appeals to the Supreme Court of the United States from the decision of this honorable court rendered in this cause in favor of the United States on October 24, 1921.

Very respectfully,

GEORGE E. HAMILTON,
Of Counsel.

JOHN F. McCARRON,
Attorney of Record.

Filed Nov. 10, 1921.

Ordered: That the above appeal be allowed as prayed for. Nov. 10, 1921.

By THE COURT.

21 Court of Claims.

No. 104-A.

BALTIMORE & OHIO RAILROAD COMPANY

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true copies of the pleadings in the above-entitled cause; of the argument and submission of case on demurrer; of the opinion of the Court by Hay, J.; of the judgment of the Court; of the application of plaintiff for an appeal to the Supreme Court and of the allowance of same.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Fifteenth day of November, A. D., 1921.

[Seal of Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,575. Court of Claims. Term No. 620. Baltimore and Ohio Railroad Company, appellant, vs. The United States. Filed November 17th, 1921. File No. 28,575.

In the Supreme Court of the United States.

OCTOBER TERM, 1922.

BALTIMORE & OHIO RAILROAD COMPANY, appellant,
v.
THE UNITED STATES.
No. 208.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT.

Previous to the summer of 1917 appellant had made surveys in Maryland for a railroad known as the Marley Neck Branch, to extend along the west side of Curtis Creek, from a point on appellant's Curtis Bay Branch near the Standard Guano Plant, in Baltimore, to Thomas Point; thence crossing Curtis Creek at Thomas Point on a bridge; thence from the bridge in a southwesterly direction to Magothy River. Marley Neck Branch was projected for the purpose of developing the territory in the valley of Curtis Creek along the west shore of Patapsco River.

Late in the summer of 1917 the War Department constructed an Ordnance Depot between Curtis Creek

34802—23

and Back Creek. The line location of the Marley Neck Branch passed directly through the location of the Ordnance Depot. It is alleged that on this account, the United States insisted that the line of the Marley Neck Branch be changed in order that it pass along one of the sides of the Ordnance Depot location and not directly through the center thereof. To comply with this request, appellant *decided* to locate the crossing of the Marley Neck Branch over Curtis Creek at Stahl's Point, instead of Thomas Point. The surveys for the relocation were not completed until sometime in November, 1917.

On September 25, 1917, while these surveys and the relocation were taking place, appellant contracted with McLean Contracting Company on a unit-price basis for the construction of the portion of the new line of the Marley Neck Branch from a point on appellant's Curtis Bay Branch near Standard Guano Plant to a point adjacent to the site of the Ordnance Depot between Curtis Creek and Back Creek.

The surveys with respect to the relocation of the Marley Neck Branch were still being made at the time of the letting of the contract by appellant to McLean Company. The final location of the Marley Neck Branch in the vicinity of Curtis Creek Crossing was not definitely determined until a later date. It is alleged that for these reasons the McLean Company was unable to begin its operations on the Marley Neck Branch south of Cabin Branch until November 16, 1917.

By its terms, McLean Company was required to complete its contract with appellant on or before December 25, 1917. It is alleged that but by reason of the delay for which appellant was not responsible, appellant would have extended the time of McLean Company for completing the contract to at least February 25, 1918; and because the construction had to be done in the winter months, through no fault of the contractor, appellant would no doubt have had to extend the time to even a later date.

Early in December, 1917, it had become apparent to the officers of the War Department that the construction of the Marley Neck Branch would be delayed to such an extent that operations at the Ordnance Depot would be seriously delayed. On December 15, 1917, and subsequent thereto, the Army officers insisted that the Marley Neck Branch be completed at the earliest possible date, as emphasized by letter of December 15, 1917, which follows:

WAR DEPARTMENT,
OFFICE OF THE QUARTERMASTER
GENERAL OF THE ARMY,
Washington, D. C. December 15, 1917.

No. 617 CR–E (Curtis Bay).

From: Officer in charge of Cantonment Construction.

To: Mr. M. H. Cahill, General Superintendent, B. & O. R. R. Co., Baltimore, Md.

Subject: Curtis Bay Track Facilities.

1. Confirming conversation with your chief clerk today, will state that we are ex-

exceedingly anxious for you to get your branch line now under construction, extended to our Curtis Bay Ordnance Depot. Since the original plans were made, we have added to this layout two (2) very large warehouses which will mean a great increase in the amount of freight to be handled through this terminal. It is very urgent that we have track facilities both for handling construction material and freight at the earliest possible moment. It seems to us from observation on the ground that our operations are going to be very seriously hampered by lack of track facilities unless your company is able to greatly increase progress being made on construction at this branch.

2. If you desire, I should be pleased to meet you on the ground and go over this matter at an early date.

3. Please address your reply to the personal attention of Mr. R. M. White.

By authority of the Secretary of War.

I. W. LITTELL,
Brigadier General, Q. M. Corps, N. A.,
In Charge of Cantonment Construction,
By F. M. GUNBY,
Major, Quartermaster, R. C.

F. M. G. R. M. W. E. D.

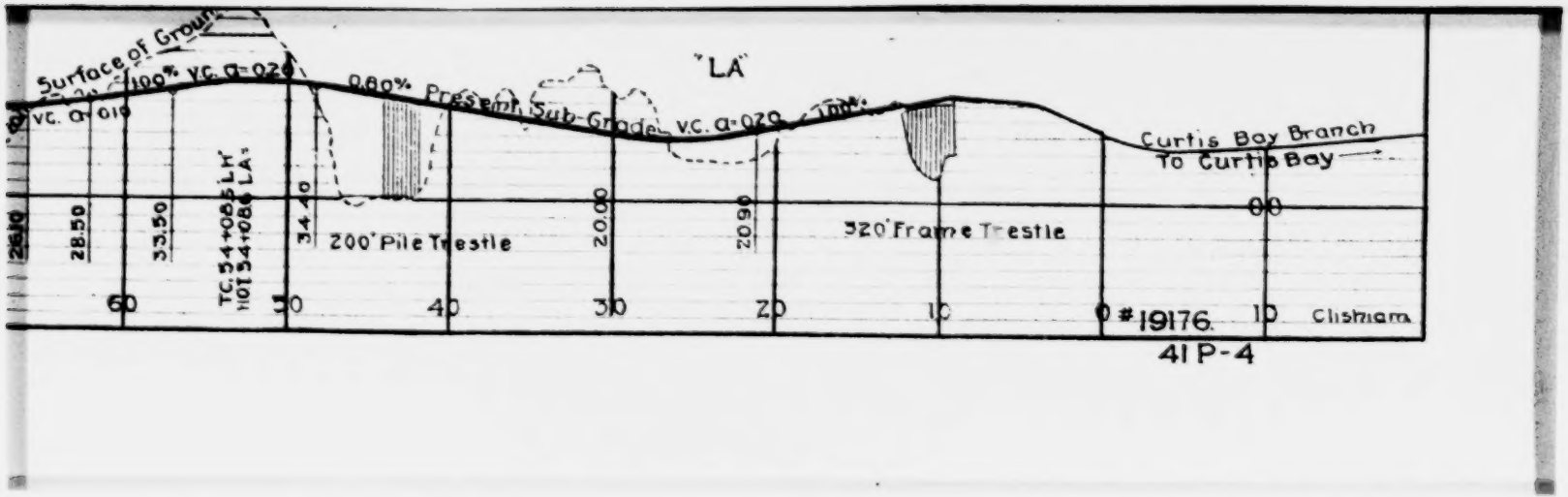
It is then alleged that in order to meet the urgent needs of the United States, it became necessary for appellant to cancel the contract with McLean Company for the construction of the Marley Neck Branch on the unit-price basis and contract with another upon a cost-plus basis to expedite the construction.

It is further alleged that appellant "on January 5, 1918, therefore, *determined* to cancel the unit-price contract it had" (Tr. 4) with the McLean Company for the construction of the Marley Neck Branch and "did cancel said contract"; that on January 5, 1918, a contract was entered into between appellant and Empire Engineering Company to complete the work of construction on a cost-plus basis and the Empire Company commenced work on January 6, 1918, and completed the construction in the latter part of February, 1918.

It is further alleged that in order to abrogate its contract with the McLean Company appellant was required to pay for all the construction by that company to January 6, 1918, on a cost-plus basis and no payment was made to that company on a unit-price basis as provided in its contract.

Conferences between the officers of appellant and the Army officers are referred to in general terms, the substance of which is that the latter requested that the Marley Neck Branch be constructed as quickly as possible and that the engineering department of appellant speed up the work so as to render every assistance to the United States during the emergency that then existed.

The construction was finished in February, 1918. On June 27, 1919, sixteen months later, appellant, under the provisions of the Act of March 2, 1919 (40 Stat. 1272), presented to the War Department its claim of $9,058.55. The Government not "having heard the first time", appellant, on April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34.40
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20.00
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2, 1920, or nine months after the foregoing claim was presented to the War Department, amended the claim and the amount was increased to $85,474.06, for which judgment is now claimed, as the excess cost of construction of the Marley Neck Branch.

The War Department rejected the claim *in toto*. Suit was then filed. The Court of Claims dismissed the petition on demurrer on the ground that "no agreement can be inferred from them (the facts alleged) which obligates the United States to pay the money claimed to be due." (Tr. 14.)

II.

ARGUMENT.

The Court will take judicial notice that during the period covered by the transactions the United States was at war with the Imperial German Government.

On March 2, 1919, the act entitled "An Act to provide relief in cases of contracts connected with the prosecution of the war and for other purposes" (40 Stat. 1272), and commonly known as the Dent Act, was passed. Section 1 provides:

> That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis, that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition

> of lands, or for the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials, or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law.

The Court will take judicial notice that the Baltimore & Ohio Railroad Company operates a large trunk line railroad.

It is not alleged or argued that it had any express contract with the Government for either the construction or relocation of the Marley Neck Branch. Nor is it alleged or argued that in the relocation and construction the officers of appellant were under any domination or duress on the part of the Army officers.

The simple facts are that the appellant had located the railroad, and while conferences were taking place between officers of appellant and the Army officers, appellant let the contract to the McLean Company on the unit-price basis. The Army officers "insisted" that the line be changed in order that it would pass along one of the sides of the proposed depot and not directly through the center.

Certainly that was not a contract, either express or implied, on the part of the United States to pay appellant for the relocation and construction. Obviously the appellant was to be the carrier of large consignments of traffic, and it is not unreasonable to assume that appellant and its officers were willing to conform to any reasonable suggestions on the part of the Army officers for the location of the track over which was to move the Government's traffic "which will mean a great increase in the amount of freight to be handled through this terminal." (Tr. 3.)

Nor did the fact that the Army officers "did urge the engineering department of your petitioner to speed up the work of construction in every possible way so as to render every assistance to the United States during the emergency that then existed" (Tr. 5) create a contract, either express or implied, that the United States was to pay appellant for the construction.

The cancellation of the contract of McLean Company on the unit-price basis and the re-letting of the work to the Empire Company on the cost-plus basis, and the subsequent settlement with the McLean Company on the cost-plus basis instead of the unit-price basis under its contract, were also matters with which none of the Army officers had anything whatever to do. The Army officers merely conferred in the most courteous and friendly manner with the officers of the Baltimore & Ohio to the end that the latter might expedite the construction of the Marley Neck Branch.

There is not a single syllable anywhere in the entire record which in any way tends to indicate that either the appellant or the Army officers ever considered that a contract, either express or implied, was being negotiated between the company and the Government by which the latter was to pay for that construction.

If the position of appellant is sound, then any person, firm, or corporation in the United States, or elsewhere, who expanded its facilities for the purpose of selling either transportation service or goods, wares, or merchandise to the Government, that the latter might prosecute the war, could thereafter hold the Government not only for the price of the service or material, as the Baltimore & Ohio undoubtedly collected its freight charges for all the traffic it moved, but likewise the cost of the facilities as well.

It must not be overlooked that the construction of the Marley Neck Branch was contemplated "for the purpose of developing the territory in the valley of Curtis Creek" before the Ordnance Depot was located. (Tr. 2) It was merely for the relocation of the track to facilitate the loading and unloading of the traffic that the claim is made.

In its petition appellant alleges that it "*decided* to locate the crossing" of its railroad over Curtis Creek at Stahl's Point instead of Thomas Point (Tr. 2). Thus the appellant itself had voluntarily assumed the work. The simple fact that the Army officers urged appellant to complete the work, not

only because of the urgent needs of the United States, but because of the increased freight business which would result by such completion, does not support an agreement on the part of the Government to pay for the construction. The Court of Claims correctly gauged the case in the following words (Tr. 14):

> It is not necessary to set out in this opinion these facts which are recited in full in the petition. Suffice ito say that after a careful examination of the facts relied upon by the petitioner, the court is of opinion that no agreement can be inferred from them which obligates the United States to pay the money claimed to be due. The facts alleged in the petition do not disclose any agreement, express or implied, between the petitioner and the United States, and therefore this court can not give relief either under the Dent or Tucker Acts. In order to recover in this court under either act there must be a promise to pay, or the implication of a promise to pay. The demurrer of the defendant is therefore sustained, and the petition of the plaintiff is dismissed.

Instead of holding the Government liable in such a way for their conduct, the officers of the Army should be highly commended for urging appellant to speed up the construction of the Marley Neck Branch to the end that the volume of appellant's own traffic might be increased and the war against Germany might be the more vigorously prosecuted. With that one would suppose that the appellant

would also be satisfied. However, it retains and owns the railroad, it acquired the increased volume of traffic, and it now seeks a large sum in addition to both.

The judgment of the Court of Claims should be affirmed.

BLACKBURN ESTERLINE,
Assistant to the Solicitor General.

February, 1923

( )

Office Supreme Court, U. S.
FILED
JAN 26 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1922, No. 208.

(Was No. 620, October Term, 1921.)

BALTIMORE & OHIO RAILROAD COMPANY,
Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

GEORGE E. HAMILTON,
JOHN F. McCARRON,
Attorneys for Appellant.

(28,575)

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922, No. 208.

(Was No. 620, October Term, 1921.)

BALTIMORE AND OHIO RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT.

The cause herein comes to this court on appeal from the Court of Claims.

Appellant, prior to November 12, 1918, and on or about the fifteenth day of December, 1917, entered into an informal or implied agreement with an offi-

cer or agent acting under the authority, direction, or instruction of the Secretary of War of the United States on behalf of the United States for the payment by the United States to your appellant for extraordinary expenses and excess cost of construction of the Marley Neck Branch Railroad of your appellant situated in the State of Maryland, and for the payment of the construction of a special detour track, trestle and turnout in connection with the construction of the said Marley Neck Branch Railroad to the site of the United States Ordnance Depot, Curtis Bay, Maryland, in order that the United States might obtain material for the construction of its Ordnance Depot at Curtis Bay, Maryland. Under date of December 15, 1917, Major F. M. Gunby, of the Quartermaster's Corps, had emphasized by letter to appellant's General Superintendent, M. H. Cahill, the urgency of the construction of the said Marley Neck Branch Railroad to be extended to the United States Ordnance Depot at Curtis Bay for handling construction material and freight at the earliest possible moment. In addition to the aforesaid a number of other army officers conferred with claimant's agents to speed up the work of construction of the said Marley Neck Branch Railroad in every possible way. Appellant had, under date of September 25, 1917, contracted with the McLean Contracting Company of Baltimore, Maryland, to construct the said Marley Neck Branch Railroad on a unit-price basis, and, in order to meet the urgent needs of the United

States for the transporting of material and freight to the United States Ordnance Depot at Curtis Bay and to expedite the same, was compelled to cancel its agreement with the McLean Contracting Company, and under date of January 5, 1918, appellant entered into a contract with the Empire Engineering Company on a cost-plus basis to complete the construction of the said Marley Neck Branch Railroad, and the said Empire Engineering Company commenced work on said construction on January 6, 1918, and continuously pursued the said work of construction both day and night from the said January 6, 1918, until the completion of the said construction, in the latter part of February, 1918.

Compensation is sought by appellant solely for the excess cost of construction of the said Marley Neck Branch Railroad occasioned by the requests of the officers of the War Department for the urgent needs of the United States in requiring the prompt and expeditious construction of the Marley Neck Branch Railroad so material and freight could be furnished to the United States at the Curtis Bay Ordnance Depot. The nature, terms and conditions of the informal or implied agreement are fully set forth in the petition (pages 1 to 12, inclusive).

Appellant, under date of June 27, 1919, presented its claim to the War Department, in the amount of $9,058.55, for the excess cost of construction and extraordinary expenses occasioned by the necessities of the said Marley Neck Branch Railroad and

said claim was presented under the provisions of the Act of March 2, 1919, 40 Statute L., 1272, known as the Dent Act. The said claim was amended on April 2, 1920, and the amount increased to $85,-474.06, due to the fact that when the original claim was filed by the Federal Auditor the amount of $9,085.55 was based solely upon the cost of labor and material incidental to the construction of the temporary detour track of the Marley Neck Branch Railroad. Under the Dent Act it was necessary to file the claim prior to June 30, 1919, and the Federal Auditor compiled the figures as were then available. As soon as the additional expense items became available, the claim was amended on April 2, 1920, and the amount increased to cover all the items of the claim and said amended claim was passed upon by the War Department.

On June 4, 1920, the Claims Board, Transportation Service, War Department, denied relief to your petitioner. Appeal was then taken to the Appeal Section, War Department, and a hearing was had before said Appeal Section on July 16, 1920. On August 12, 1920, the Appeal Section denied relief to appellant, but in its decision said:

> *"While the construction in question inured to the benefit of the War Department by enabling it to get certain of its materials into the Ordnance Supply Depot at Curtis Bay,* yet that was not the sole object of the construction of this track." (Italics ours.)

On August 20, 1920, appellant appealed to the Secretary of War, but that official denied relief to your appellant under date of November 24, 1920.

Appellant, under date of May 4, 1921, filed its petition in the Court of Claims for the recovery of the amount of its said claim passed upon by the War Department and demurrer was filed by the United States to appellant's petition on June 29, 1921. On October 11, 1921, the demurrer was argued and submitted, and under date of October 24, 1921, a written opinion was handed down by the Court of Claims dismissing appellant's petition.

SPECIFICATION OF ERRORS.

1. The appellant claims that the Court of Claims erred in sustaining the defendant's demurrer, as the petition does state facts sufficient to constitute a cause of action under the Dent Act, 40th Statute L., 1272, and said cause of action is within the jurisdiction of the court.

2. The court erred in holding that the appellant did not rely on the allegations contained in paragraph 1 of the petition in connection with the nature, terms, and conditions of the informal or implied agreement that is fully set forth in the petition.

3. The court erred in holding that no agreement can be inferred from the facts relied upon by appellant which obligates the United States to pay the money claimed to be due.

4. The court erred in saying that the facts a
leged do not disclose any agreement, express
implied, between appellant and the United State
as the court could not determine the existence of t
implied agreement or the implication of a promi
to pay without having before it the testimony a
duced in support of the allegations of the petitio

BRIEF.

ARGUMENT.

POINT 1.

COURT OF CLAIMS ERRED IN SUSTAINING DEMURRER.

The decision of the Court of Claims in this case is, in our judgment, entirely in error.

The court states that appellant, "Not relying on the aforesaid allegation," meaning paragraph one of the petition, "proceeds to set out in its petition the facts from which it deduces that an informal or implied agreement was entered into by the United States," and that "It is not necessary to set out in this opinion these facts, which are recited in full in the petition." Appellant insists that the allegations of paragraphs 1, 2, and 3 are not separable and must be considered together in the matter of appellant's claim. Paragraphs 2 and 3 of the petition amplify and set out the basis of the informal or implied agreement contained in paragraph 1 of the petition. Appellant contends that the petition is clear as to the allegations.

The court further states:

> "Suffice it to say that after a careful examination of the facts relied upon by the petitioner, the court is of opinion that no agreement can be inferred from them which

> obligates the United States to pay the money claimed to be due. The facts alleged in the petition do not disclose any agreement, express or implied, between the petitioner and the United States, and therefore this court cannot give relief either under the Dent or Tucker Acts. In order to recover in this court under either act there must be a promise to pay, or the implication of a promise to pay." (Rec., p. 14.)

To this we strongly dissent, for we insist that the petition filed in this case presents in its statement facts and conditions which, if proven, would be, under a sufficient and fair base, an implied agreement under the Dent Act. The Court of Claims states that in order to recover in that court "there must be a promise to pay, or the implication of a promise to pay." How can an implication of a promise to pay on an implied contract be shown without a full statement of the proven facts of the petition before the court? We say that it is necessary to have the testimony in support of the allegations of the petition before the court in order to determine an implication of a promise to pay under an implied contract, and that the Court of Claims erred in sustaining the demurrer to the petition without giving appellant an opportunity to submit its evidence in support of the allegations of the petition.

POINT 2.

PRESENTATION OF CLAIM UNDER THE DENT ACT.

Under date of March 2, 1919, there was enacted what is known as the Dent Act, "An act to provide relief in cases of contracts connected with the prosecution of the war and for other purposes (40th Statute L., 1272). Section 1 of that act provides as follows:

> "That the Secretary of War be, and he is hereby authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction, or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the Government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person,

> firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law."

The court will take judicial notice that the Dent Act became a law March 2, 1919, and no opportunity was afforded to present this claim under that act to the War Department until after March 2, 1919, and before June 30, 1919. It will be observed that the War Department took jurisdiction of the claim under the Dent Act.

The purpose and scope of the Dent Act is to afford relief in cases of this kind, and the memorandum of the War Department to Congress outlining the purposes of the legislation in question shows this very clearly.

It is stated in said memorandum, in part, as follows:

> "Yielding to the exigencies of the war situation, such contractors put the work of production ahead of the work of negotiation, and have often put themselves in a position where their only reliance was the good faith and fairness of the Government in finally fixing the terms of the agreement. For example, in the manufacture of a certain important type of gun it was thought impracticable to determine the proper price basis at the time the order for the production of the gun was given, as there was insufficient experience as to what the cost of manufacture would be and the determination of the price; and so the final execution of the for-

mal contract was left until there would be sufficient actual manufacturing experience for the Government to make a proper determination as to price. Further, there are a number of instances where the Government, in execution of its plans for the erection of a munition plant or the creation of a cantonment, induced the occupants of land to vacate it and go to considerable expense without any agreement as to compensation for the purchase or use of the land having been actually reached. With the armistice the plans of the Government have been so changed that the Government cannot properly now proceed with the purchase of the land in question, and there is nothing between the Government and the persons who have vacated their land but a vague, implied agreement to compensate them. * * *

"Nor should the patriotism be penalized of those who in the exigencies of the war have gone ahead to produce instead of waiting to bargain. It is true that such persons have nothing to rely on except the good faith of the United States, but surely there should be no more solid ground for reliance than that good faith."

(House Report No. 877, 65th Congress, 3rd Session.)

Furthermore, the act provides for the filing of the present claim in the Court of Claims, as shown by section 2:

"That the Court of Claims is hereby given jurisdiction on petition of any individual, firm, company, or corporation referred to in

section 1 hereof to find and award fair and just compensation in the cases specified in said section in the event that such individual, firm, company, or corporation shall not be willing to accept the adjustment, payment, or compensation offered by the Secretary of War as hereinbefore provided, *or in the event that the Secretary of War shall fail or refuse to offer a satisfactory adjustment, payment, or compensation as provided for in said section.*"

(Section 2 of Dent Act, 40th Statute L., 1272, March 2, 1919.) (Italics ours.)

Appellant contends that by the aforesaid section jurisdiction is conferred on the Court of Claims to hear and adjudicate the instant case upon the merits.

It was said by this court:

"In passing upon these questions we wish it to be distinctly understood that we express no opinion in this case except upon the jurisdiction of the circuit court to entertain this bill and its authority to pass upon the several defenses set up in response thereto. We do not say that the court may not ultimately come to a conclusion to dismiss the bill upon its own allegations, if the several questions be raised by demurrer; but we do not think it was proper to dispose of them by motion to dismiss for want of jurisdiction. The difficulty we find in the case is that the defendant has confused that which is jurisdictional with that which is not, and has at-

tempted to forestall the ultimate action of the court by attacking its jurisdiction upon propositions which belong to the merits."

Illinois Central Railroad Co. *vs.* Adams, 180 U. S., page 39.

And this court further stated:

"A contract, express or implied in fact, must, it is true, be established, but one to pay for a mechanism used will be implied rather than a tortious appropriation of it—rather than the exercise by the United States of its sovereignty in aggression upon the rights of its citizens."

United States *vs.* Bethlehem Steel Co., No. 127, decided April 10, 1922.

In a very recent case this court has said:

"The present case was decided upon demurrer. The question, therefore, is not what inferences should be drawn from the facts that may be proved, but whether the allegations, if proved, would require, or at least warrant, a different finding from those previously reached."

Portsmouth Harbor Land & Hotel Company *et al. vs.* United States, No. 97, decided December 4, 1922.

POINT 3.

TESTIMONY IN SUPPORT OF ALLEGATIONS OF THE PETITION SHOULD BE BEFORE THE COURT SO AS TO DETERMINE THE EXISTENCE OF THE IMPLIED AGREEMENT.

Appellant contends that the Court of Claims erred in saying that the facts alleged do not disclose any agreement express or implied between appellant and the United States as the court could not determine the existence of the implied agreement or the implication of a promise to pay without having before it the testimony adduced in support of the allegations of the petition. This court has said:

> "If the petition can be fairly said to present the claim that the United States, not simply by virtue of succession to sovereignty under the treaty of cession, but through its subsequent transactions with the appellant, and by contract to be implied from such transactions, has become indebted to the appellant, we think that the claim, as thus limited, would be within the jurisdiction of the court below under the act of 1887. It is true that the averments of the petition lack definiteness. It is not specifically alleged that the United States has received the tax or enjoyed the benefit of the half rates, nor is it precisely stated what transactions have been had between the Government and the appellant. But the petition alleges that the

United States, since it entered into the occupancy of the Islands, has 'availed itself of all the benefits and advantages' of the submarine cable and telegraph lines established by the appellant, 'using the said lines of cable and telegraph for its governmental and other purposes, which it has continued to do ever since and still continues to do,' and that "it has become in all respects the successor of the Government of Spain to all rights, privileges, and advantages conferred upon and secured and reserved to the Government of Spain under the terms of the aforesaid concession.' These general allegations are not altogether inapposite with respect to a claim based upon an implied contract outside of the treaty itself, and the claimant should not be denied the right to have its claim, thus considered, adjudicated. In this view, the petition would be susceptible of amendment, and its sufficiency, in law and fact, could be heard and determined.

"We express no opinion upon the merits of the claim, in this aspect, as they are not before us, the court below having declined to take jurisdiction. But as we think there was jurisdiction to pass upon the claim under the limitations above stated, the judgment will be reversed and the cause remanded, with instructions to the court below to take further proceedings in conformity with this opinion."

Eastern Extension, Australasia & China Telegraph Co. *vs.* United States, 231 U. S., page 326.

In the aforesaid case, which was subsequently tried in the Court of Claims (54 C. Cls., 108), judgment was rendered by the Court of Claims in favor of the defendants. Upon appeal from said decision this court, in 251 U. S., 355, affirmed the lower court.

In the opinion of the court, by Mr. Justice Clarke, he states in part:

> "The United States denied all liability, and the judgment of the Court of Claims, dismissing the petition, is before us for review.
>
> "The case was here before on appeal and this court held (231 U. S., 326; 58 L. Ed., 250; 34 Sup. Ct. Rep., 57) that the case as then stated in the petition was not within the jurisdiction of the court of claims, whether viewed as asserting an obligation growing directly out of the treaty with Spain or one imposed by principles of international law upon the United States as a consequence of the cession of the Islands by the treaty. The court, however, referring to certain general and indefinite allegations in the petition, suggested that the implication might be drawn from them that there may have been action on the part of officials of the Government of the United States since it had assumed sovereignty over the Islands, which, if properly pleaded and proved, would give rise to an implied contract with the claimant outside the treaty, which would be within the jurisdiction of the court of claims, and, to the end that the right to have such a claim adjudi-

cated might be saved, if it really existed, the case was remanded for further proceedings in conformity with the opinion."

And, concluding, he further states:

"In the jurisdiction given to the court of claims Congress has consented that contracts, express or implied, may be judicially enforced against the government of the United States. But such a liability can be created only by some officer of the government lawfully invested with power to make such contracts *or to perform acts from which they may be lawfully implied.* Langford *v.* United, 101 U. S., 341, 345; 25 L. Ed., 1010, 1012; United States *v.* Buffalo Pitts Co., 234 U. S., 228; 58 L. Ed., 1290; 34 Sup. Ct. Rep. 840; Temple *v.* United States, 248 U. S., 121; 63 L. Ed., 162; 39 Sup. Ct. Rep., 56; Ball Engineering Co. *v.* J. G. White & Co., 250 U. S., 55; 63 L. Ed., 840; 39 Sup. Ct. Rep., 393." (Italics ours.)

Eastern Extension, Australasia and China Telegraph Company *vs.* United States, 251 U. S., 355.

And this court has further stated:

"If objected that the petition contains no count upon an implied contract for *quantum meruit,* it may be answered, that the forms of pleading in the Court of Claims are not of so strict a character as to preclude the claimant from recovering what is justly due

> to him upon the facts stated in his petition, although due in a different aspect from that in which his demand is conceived."
>
> Thomas L. Clark *vs.* United States, 95 U. S., page 539.

Furthermore, this appellant, in the emergency and stress of war, without attempting to bargain, proceeded to assist the United States in a very important and urgent matter, and it should not be deprived of its property without an opportunity for a hearing upon the merits.

There is the fact of not one, but a number of conferences between officers of the War Department and appellant's officials in order to expedite the construction of the said Marley Neck Branch Railroad, and a more detailed knowledge of said conferences, as averred in the petition, can be examined only after testimony in regard to them has been introduced by appellant in order to determine their full purport, which cannot be done in the petition.

It has been held:

> "In implied contracts 'the parties have capacity to contract; facts, circumstances, few or many, clear or complicated, exist, which lead the minds of the jurors to the conclusion that the minds of the parties met. Minds may meet by words, acts, or both. The words even may negative such meeting, but "acts which speak louder than words" may conclude him who denies a tacit contract.' Sceva *vs.* True, 53 N. H., 627, 629."
>
> 13 Corpus Juris, page 242.

The Court of Claims has said:

> "Implied contracts in fact do not arise from the denials and contentions of parties, but from their common understanding in the ordinary course of business, whereby mutual intent to contract without formal words therefor is shown. (Hertzog *v.* Hertzog, 29 Pa. St., 465, and authorities there cited; Harley *v.* United States, *supra.*)
>
> Knapp *vs.* United States, 46 Ct. Cl., 643.

And in order to show "their common understanding" we insist that testimony should be permitted to be introduced in the instant case, for it has been held:

> "An implied contract, as well as an expressed contract, should be established by proof, to authorize recovery thereon, and the burden of proof rests upon the plaintiff."
>
> Richardson *vs.* Hoyt, 60th Iowa P., 70.

And it has been further held:

> "The cases holding that where no attempt has been made to reduce the terms of a contract to formal language the intention of the parties as gathered from what they said and did is a question of fact for the jury are very numerous. Tatterson *vs.* Suffolk Manufacturing Co., 106 Mass., 56, may stand for the class."
>
> Gannon *vs.* Brady Brass Co., 82 New Jersey Law Reports, page 414.

In Knote *vs.* United States, in 95 U. S., at page 149, in defining the jurisdiction of the Court of Claims and what constitutes an implied contract, this court said:

> "The jurisdiction of that court is limited to claims founded upon a law of Congress, or upon a regulation of an Executive Department, or upon a contract, express or implied, with the Government. The claim here presented rests upon a supposed implied contract to pay to the claimant the money received as the proceeds of the forfeited property. *To constitute such a contract, there must have been some consideration moving to the United States; or they must have received the money, charged with a duty to pay it over; or the claimant must have had a lawful right to it when it was reserved as in the case of money paid by mistake.*" (Italics ours.)

In the instant case the Appeal Section of the War Department, in its decision denying relief, said:

> "*While the construction in question inured to the benefit of the War Department by enabling it to get certain of its materials into the ordnance supply depot at Curtis Bay, yet that was not the sole object of the construction of this track.*" (Rec., p. 5.) (Italics ours.)

It will be observed that it is stated:

> "yet that was not the sole object of the construction of this track."

This appellant never contended that it was and does not now make such a contention. It does, however, earnestly and sincerely say that the United States required speedy construction and should, therefore, pay for the excess cost of the said construction of the road. There would have been no need for the excess cost if it were not for the emergency of war and the needs of the War Department in desiring a speedy construction of the road. And the War Department makes the frank admission that a service was rendered it in that part of its decision hereinbefore set forth.

In Ball Engineering Company *vs.* J. G. White and Company, 250 U. S., 55, this court said:

> " 'The law will imply a promise to make the required compensation, where property to which the Government asserts no title is taken, pursuant to an act of Congress, as private property, to be applied for public use,' or, in other words: 'Whenever, in the exercise of its governmental rights, it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor.' But in the case at bar, both the pleadings and the facts found preclude the implication of a promise to pay. For the property applied to the public use is not, and was not conceded to be, in the plaintiff."

In that case it will be noted that while the court did not find there was an implied contract to pay or an implication of a promise to pay yet the court did not merely base its findings upon the pleadings, but both upon the pleadings and the facts. In the instant case the court made its finding solely upon the allegations of the petition and the demurrer of the defendants.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be reversed for the following reasons:

1. The petition states facts sufficient to constitute a cause of action under the Dent Act and said cause of action is within the jurisdiction of the Court of Claims.

2. That the appellant should be permitted to submit its case on the merits in order that the court may determine the implied agreement averred in the petition after consideration of the evidence adduced in support of the allegations of the petition.

Very respectfully,

GEORGE E. HAMILTON,
JOHN F. MCCARRON,
Attorneys for Appellant.

BALTIMORE & OHIO RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 208. Argued March 7, 1923.—Decided March 19, 1923.

1. To permit a recovery under the "Dent Act", c. 94, 40 Stat. 1272, there must have been an agreement express or implied. P. 386.
2. Where, at the insistence of Army officers, a railroad company hastened construction of a branch line to reach an ordnance depot, and in so doing, on its own determination, without notice to the Government or mention of compensation, went to additional expenses, *held*, that no agreement on the part of the Government to repay them could be implied. P. 387.

56 Ct. Clms. 377, affirmed.

APPEAL from a judgment of the Court of Claims dismissing a petition on demurrer.

Mr. John F. McCarron, with whom *Mr. George E. Hamilton* was on the brief, for appellant.

Mr. Blackburn Esterline, Assistant to the Solicitor General, for the United States.

MR. JUSTICE SANFORD delivered the opinion of the Court.

The Railroad Company filed its petition in the Court of Claims asking judgment for the amount of certain "extraordinary expenses" which it claimed to have incurred in constructing a branch railroad to the Ordnance Depot at Curtis Bay, Maryland, under "an informal or implied agreement" with officers of the War Department for the reimbursement of such expenses by the United States. The Dent Act, March 2, 1919, c. 94, 40 Stat. 1272. A demurrer to this petition was sustained. 56 Ct. Clms. 377

The allegations of the petition setting forth specifically "the nature, terms and conditions" of the "agreement", may be thus summarized: Having previously determined to build a branch railroad into the Curtis Bay region, for the purpose of developing new territory, the Railroad Company, in the summer of 1917, at the request of the War Department, changed in part the location of the proposed line so as to pass alongside the Ordnance Depot which the War Department planned to build. The company then contracted with a construction company for the building of the railroad to the site of the Depot, on a unit-price basis. The work was greatly delayed by the relocation of the line, and carried into the winter months. After numerous conferences as to means of expediting the work, the officers of the Department, in December, insisted that the operations at the Depot would be seriously hampered unless the company could greatly increase progress on the construction of the railroad, and that, in order to furnish track facilities for handling construction materials and freight at the Depot, it was very urgent that the railroad be completed at the earliest possible moment. Thereupon, in order to meet the urgent needs of the Department, the company, in January, 1918, determined to and did cancel the contract for constructing the railroad on a unit-price basis, and made a contract with another construction company for completing it on a cost plus basis. By working continuously, day and night, the new contractor completed the railroad to the Depot in the latter part of February, before it would have been completed under the original contract. The excess cost of thus constructing the railroad under the cost plus plan and the extraordinary expense incurred in hurrying its completion, amounted to $85,474.06; for which judgment was prayed.

These allegations show no "agreement, express or implied" for the payment of these expenses, which is essen-

tial to an award in plaintiff's favor under the provisions of the Dent Act. No express agreement is alleged. And manifestly the mere fact that, on the urgent insistence of the officers of the Department that the construction of the railroad be hastened so as to handle construction materials for the Depot and other freight (necessarily yielding revenue to the railroad), the company, on its own determination, substituted the cost plan of construction for the unit-price plan, without any notice to the Department of its intention so to do or of the increased expenses that would result, does not, in the absence of any intimation that it would look to the United States for reimbursement of such increased expenses or of any suggestion by the Department that such reimbursement would be made, afford any substantial basis upon which an agreement for the payment of such expenses can be implied.

The judgment of the Court of Claims dismissing the petition is accordingly

Affirmed.